

KINROSS CANDELARIA MINING CO.

IBLA 95-253

Decided March 19, 1998

Appeal from a Decision of the Nevada State Office, Bureau of Land Management, refusing to unconditionally release a reclamation surety bond after accepting a replacement reclamation bond for the same amount. N36-81-003P.

Reversed.

1. Mining Claims: Plan of Operations

The amount of a surety bond to assure performance of the stabilization and reclamation obligations contemplated under a mining plan of operations is determined by estimating the cost of stabilization and reclamation if the operator fails to carry out those obligations.

2. Mining Claims: Plan of Operations

When BLM unconditionally approves the assignment of a mining plan of operations, the party assigning the plan of operations is relieved of liability for compliance with future mining plans of operations. Approval does not release the assignor of any obligations it might have accrued prior to approval of the assignment.

APPEARANCES: Daniel A. Jensen, Esq., Salt Lake City, Utah, for Kinross Candelaria Mining Company.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Kinross Candelaria Mining Company (Kinross) has appealed a January 11, 1995, Decision issued by the Nevada State Office, Bureau of Land Management (BLM), refusing to unconditionally release Kinross' original reclamation surety bond after accepting a replacement reclamation bond.

By way of background, NERCO Metals, Inc. (NERCO), originally owned and operated a mine known as the Candelaria Mine, located in Nevada. This mine was operated under BLM Plan of Operations No. N37-81-003P. Pursuant to that plan of operations, NERCO submitted a surety bond required by the

regulations at 43 C.F.R. § 3809.1-9. This bond was accepted and approved by BLM. NERCO's parent corporation sold all of its NERCO stock to Kinross Gold U.S.A., and NERCO's name was changed to Kinross Candelaria Mining Company. A condition of sale between NERCO's parent corporation and Kinross Gold U.S.A. was the release of the surety bond issued to NERCO; i.e., replacement of the original bond with one obtained by the purchasing entity.

Kinross obtained a bond in the same amount and subject to the same terms and conditions as that submitted by NERCO and approved by BLM. The new bond was submitted to BLM on November 10, 1993, and BLM was asked to replace the NERCO bond with the new bond.

On December 7, 1993, BLM issued a Decision containing the following language:

Effective July 30, 1992, we accepted surety bond number 400 JK 1425 * * * from NERCO Metals, Inc. * * *.

On November 12, 1993, we received a bond from Kinross Candelaria Mining Company. On November 22, 1993, we received notice that NERCO Metals, Inc. was acquired by Kinross Gold U.S.A., Inc. * * * and that the name was changed to Kinross Candelaria Mining Company. Kinross assumed all liabilities, obligations, and agreements which were previously made * * * under NERCO ownership. NERCO's interest in the plan of operations * * * has been transferred in its entirety and bond coverage furnished by the acquiring operator * * *.

The bond provided by Kinross has been examined and found satisfactory. Therefore, the replacement bond is accepted effective November 22, 1993. The bond covers operations conducted by or on behalf of the principal on the Candelaria Mine, plan of operations number N37-81-003P.

The period of liability under the previous bond terminated effective November 22, 1993. Please note that termination of the period of liability does not relieve the obligor of any obligations for any liabilities that may have accrued prior to the date the period of liability terminated.

The December 7, 1993, Decision did not advise Kinross and NERCO that they had a right of appeal, and Kinross and NERCO were concerned about the language of the last paragraph. Kinross explains in its Statement of Reasons (SOR) that the last paragraph suggests that the original bond had "not been fully released, despite BLM's acceptance of a replacement bond in the same amount, submitted by the same owner and operator, and covering the same plan of operations." (SOR at 4.)

Kinross and NERCO then contacted BLM seeking clarification of the term "obligor" in the December 7, 1993, Decision. In response, BLM stated that

it wanted to make sure that any liabilities arising prior to acceptance of the replacement bond would still be covered by an adequate reclamation bond. In response, Kinross and the bonding company submitted a rider stating that the replacement bond would cover all past, present, and future stabilization and reclamation liabilities. After being advised that the above quoted wording of the December 7, 1993, Decision would not be changed, on November 18, 1994, Kinross protested BLM's determination, asking BLM to either (1) acknowledge the sufficiency of the bond rider and unconditionally release the original surety bond, or (2) refuse to do so in a final decision so that Kinross could appeal to this Board. In response, BLM issued its January 11, 1994, Decision holding to the language in its December 7, 1993, Decision and dismissing Kinross' protest. Kinross then appealed to this Board.

[1] Two important points must be kept in mind when attempting to understand the nature and condition of the release sought by Kinross in this case. The first is the purpose of the bond, and the second is the difference between a release from future liability at the completion of a project and the acceptance of a substitute bond or party when the project is ongoing.

The bond in this case is a surety bond to assure performance of the reclamation obligations contemplated under an amended plan of operations for the Green Nick and Georgine open pit mines. The bond amount was based upon "the estimated cost of reasonable stabilization and reclamation" of the affected land. 43 C.F.R. § 3809.1-9(b). The bond is required to assure that, if the operator fails to fully perform the stabilization and reclamation obligations mandated by the approved plan of operations, funds will be available to pay for that stabilization and reclamation. The regulation provides that if the stabilization and reclamation requirements increase, the bond amount can be increased (43 C.F.R. § 3809.1-9(e)), and provides for reduction of the bond amount when the operator has completed a portion of the stabilization and reclamation, thereby reducing the projected cost of completion (43 C.F.R. § 3809.1-9(f)). When NERCO's interest in those mines was transferred from NERCO to Kinross, the mining operations were continuing, and there is no evidence that there had been any breach of the provisions of the operating plan that would allow BLM to seek payment from the bonding company. Thus, when BLM released the NERCO bond, the reclamation obligation continued. The operator had neither carried out the reclamation obligation nor breached the terms of the operating agreement by failing to do so.

An unconditional release of a bond because the performance of stabilization and reclamation called for in the plan of operations was completed would relieve the bonding company of liability to assure compliance. In this case, BLM is not being asked to release a bond because the obligation to stabilize and reclaim the land has been satisfied. It is being asked to accept the substitution of one bond for another. If it had found the terms and conditions of the bond to be unacceptable, BLM could have refused to accept the replacement bond until the terms and conditions were amended to

its satisfaction. It did not. If it found the bond amount insufficient to cover the costs of stabilization and reclamation, it could have called for an increase in the bond amount. It did not. It notified Kinross that the bond provided by Kinross had been examined and found satisfactory. The replacement bond was accepted effective November 22, 1993. The period of liability under the previous bond terminated effective November 22, 1993. (Dec. 7, 1993, Decision.)

We find no problem with the portion of the December 7, 1993, Decision discussed in the above paragraph. However, the December 7, 1993, Decision went on to say: "Please note that termination of the period of liability does not relieve the obligor of any obligations for any liabilities that may have accrued prior to the date the period of liability terminated." This language is unnecessary. The bond amount was deemed sufficient to cover all stabilization and reclamation requirements under the plan of operations. If it was not, the proper action would have been to call for an increase in the bond amount. The regulations clearly contemplate requiring a bond of sufficient amount to assure that the mined lands are stabilized and reclaimed, and if the amount of a bond submitted to replace a previously approved bond is sufficient to cover the cost of doing so, there is no reason to require the continued maintenance of the initial bond. The stabilization and reclamation obligation is ongoing. If not completed by NERCO it must be completed by Kinross.

[2] It is important to distinguish between the liability of a bonding company issuing a bond to satisfy the requirements of 43 C.F.R. § 3809.1-9 and the continued liability of the party assigning the responsibilities under an operating agreement. The bonding company does not stand in the shoes of the obligor, but is merely assuring that the obligor carries out the terms and conditions of the operating plan. The bonding company can only be called upon if the obligor fails to carry out the reclamation called for in the operating plan.

The last paragraph in the December 7, 1993, Decision should be interpreted as stating that BLM's acceptance of the assignment and release of the bond should not be construed as a release of any obligation NERCO (or its successor-in-interest) may have accrued prior to the date BLM approved the assignment of NERCO's interest to Kinross. When BLM approves the assignment of a mining plan of operations, the party assigning the plan of operations is relieved of further liability for compliance with the mining plans of operations. The approval of the assignment does not excuse the assignor from liability for the obligations that may have accrued during the period it was responsible for the conduct of operations.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the January 11, 1995, Decision dismissing Kinross' protest is reversed, and the December 7,

1993, Decision recognizing the assignment of NERCO's interest to Kinross and accepting a substitute surety bond is affirmed as modified by this Decision.

R.W. Mullen
Administrative Judge

I concur in the result:

Franklin D. Arness
Administrative Judge

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